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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 578

HELMS BAKERIES, a corporation,

Petitioner, and Appellee Below,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, R. E. COLLINS, GEORGE R. REILLY, HARRY B. RILEY, FRED E. STEWART and WILLIAM G. BONELLI, individually and as members of the State Board of Equalization of the State of California,

Respondents and Appellants Below.

Petition for Writ of Certiorari to the Supreme Court of the State of California and the District Court of Appeal of the State of California and Brief in Support Thereof.

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vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, R. E. COLLINS, GEORGE R. REILLY, HARRY B. RILEY, FRED E. STEWART and WILLIAM G. BONELLI, individually and as members of the State Board of Equalization of the State of California,

Respondents and Appellants Below.

Petition for Writ of Certiorari to the Supreme Court of the State of California and the District Court of Appeal of the State of California.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, HELMS BAKERIES, a corporation, respectfully shows:

I.

Summary Statement of the Matters Involved.

The petitioner, HELMS BAKERIES, a California corporation, prays that a writ of certiorari be issued by the Supreme Court of the United States to review a decision of the District Court of Appeal of the State of California, First Appellate District, Division 2, together with the action of the Supreme Court of the State of California, refusing a hearing after decision by the District Court of Appeal.

The above entitled action was in equity for an injunction. It was filed by HELMS BAKERIES, a corporation, hereinafter referred to as the "Bakery", against the State Board of Equalization of the State of California and its members, for an injunction to permanently enjoin a threatened cancellation of a California Retail Sales Tax Permit held by HELMS BAKERIES under the California Retail Sales Tax Act of 1933, as amended. (Cal. Stats. 1933, p. 2599, as amended; Act 8493, Deering's Gen. Laws.)

The Bakery received a temporary injunction prior to the trial and after trial by the Court without a jury, was awarded a judgment making the injunction permanent. From that judgment the Board and its members appealed to the California Supreme Court within the time provided by law and filed an opening brief [Rec. p. 61]. The Bakery filed a respondent's brief in the Supreme Court and the appellant filed a closing brief. The matter was then transferred by the Supreme Court for considera-

tion to the District Court of Appeal, First Appellate District, Division 2 [Rec. p. 61]. That court thereafter wrote a decision reversing the trial court. This decision was dated July 15, 1942 [Rec. p. 78]. Thereafter within the time provided, a petition for hearing in the California Supreme Court was filed by the Bakery. An answer to the petition was filed by the Attorney General of California, representing the Board and its members, and on September 10, 1942, an order was made by the California Supreme Court, refusing to grant a hearing in the Supreme Court. The Bakery, as petitioner, thereafter and within the three-month period, asked a review by this Court.

Morse v. U. S., 270 U. S. 151, 70 Law. Ed. 518.

The plaintiff below operates a large bakery and was and is the holder of an essential Retail Sales Tax Permit from the State of California. The State Board of Equalization threatened to revoke this permit contending as a basis for so doing, that while all other payments due from HELMS BAKERIES had been paid, it had failed to pay the 2½% tax on certain bakery goods sold during the period from October 1, 1934 to and including June 30, 1935. The findings show no delinquency on the part of the Bakery but an overpayment over $20,000.00 [Rec. pp. 4, 16] The Bakery contended, and still contends, that any such forfeiture is in violation of the constitutional rights of the petitioning corporation.

After the trial of the action which was partly on a stipulation of facts [Rec. pp. 54 and 57], and partly on

testimony [Rep. Tr. pp. 31 and 44], the Court made findings of fact and conclusions of law upholding the position throughout of plaintiff Bakery. The complaint referred to in the findings is found in the record at pages 1-9. The findings are found in the record at pages 16-19 and incorporate pages 1-9, and many of the facts are admitted by the answer. Briefly, the undisputed facts are: The plaintiff operates a bakery plant with annual gross sales of over $2,700,000.00 employing approximately 500 employees. It supplies more than 370 routemen with food products and other items for resale to consumers within the state of California. It has contracts for the purchase of raw materials and has on hand raw materials subject to deterioration. It is and has been a seller, not only of edibles, but also of other tangible personal property, for which latter a permit is still required. During the period from October 1, 1934, to and including June 30, 1935 (on which date the 2½% Retail Sales Tax on *food* was eliminated by the Amendment of 1935 to the Retail Sales Tax Act), plaintiff, at wholesale, sold food products to more than 200 routemen who resold such food products at retail to ultimate consumers, on the salesmen's own behalf and account. The Board contended that these were retail sales by HELMS BAKERIES, and that the goods were not sold by HELMS BAKERIES at wholesale to the routemen who were independent merchants. The trial court found that the routemen were independent contractors and made the retail sales themselves to the ultimate consumers, hence HELMS BAKERIES was not liable for the sales tax thereon.

Also it had overpaid the State by mistake, some $27,000.00. The correctness of these findings is not questioned in the decision of the District Court of Appeal.

The amendments of the year 1935 to the Retail Sales Tax Act were and are known as Chapters 335 and 357 of the 1935 Statutes of California. These amendments exempted from the provision of the Act and from the computation of the amount of tax levied, assessed or payable under the Act, the gross receipts from the sale of food products for human consumption. There was no "saving" clause. The Bakery pleaded [Rec. p. 4] that after July 1, 1935, the State Board of Equalization was without any jurisdiction, power or authority to levy, assess or collect any sales tax based on computed or any gross receipts derived from any sale of food products for human consumption, and the trial court found this to be true [Rec. p. 18].

In 1938, the Board proceeded to assess against HELMS BAKERIES, the alleged additional tax on foodstuffs sold by the routemen between October 1, 1934, and June 30, 1935. Neither evidence nor pleading indicate any previous demand or knowledge. The Bakery refused to pay after hearings were held at the request of the Bakery before the Board, as provided by law, but the purported assessment was nevertheless levied by the State Board of Equalization. No legal action, however, was filed by the Board to collect. Instead, on or about May 20, 1940, the Board purported to give notice in writing to the Bakery to appear and show cause why the Bakery's permit,

AX-1887 should not be revoked. The Bakery appeared and was advised that the Board was going to revoke their Retail Sales Tax Permit, and that the basis of the revocation was the failure to pay the 2½% sales tax amounting to $6,572.28, based upon the tax not paid by the routemen on their retail sales of edible food during the period from October 1, 1934, to and including June 30, 1935. This is admitted by failure to answer paragraph XII of the complaint [Rec. pp. 13, 14]. The Bakery contended that even though there is no longer a tax on edible goods sold at retail for human consumption, a sales tax permit is necessary in connection with its other sales, and there was testimony to this effect which was not controverted. The trial court determined that a sales tax permit was proved to be necessary [Rec. p. 8]. However, the District Court of Appeal in its decision [Rec. p. 83], takes the position that the proof was insufficient to show great and irreparable injury entitling the Bakery to an injunction. The Bakery further contended, and the trial court found the contentions to be true, that: 1. The State Board of Equalization was without jurisdiction to revoke any retail sales tax permit except for failure to comply with the provisions of the Retail Sales Tax Act, or the rules and regulations of the State Board of Equalization, and that at no time since June 30, 1935, or at any time, has the plaintiff failed to comply with the provisions of the Retail Sales Tax Act, or any of the rules and regulations of the State Board of Equalization prescribed or adopted under such Act [Rec. pp. 8, 16, 17]. The opinion of the District Court of Appeal does not disturb this finding.

II.

Reasons Relied on for the Allowance of the Writ.

1. The Supreme Court of the United States has jurisdiction and should issue the writ, under Title 28, paragraph 344 of the U. S. C. A. (Jud. Code, Sec. 237, as amended). The court here has to consider a final judgment or decree in the highest court of the state of California in which a decision in the suit could be had in, which decision and in which case there is drawn into question: First, the validity of a statute (the Cal. Retail Sales Tax Act of 1933, as amended) on the ground of its being repugnant to the Constitution, and wherein the decision of the court of last resort in California is in favor of the statute's validity, and second, the title, right, privilege, or immunity which is specially set up or claimed by applicant under the Constitution [for mention in Decision, see Rec. p. 85, and for mention in Petition for Hearing, see Rec. pp. 63-64].

In addition to the general jurisdictional rights of the Supreme Court of the United States to take jurisdiction as set forth in paragraph I of this subdivision of the petition, for reasons hereinafter stated the Supreme Court should take jurisdiction to protect the rights of the petitioner under the United States Constitution. The state courts have decided federal questions of substance not theretofore determined by this court and in ways not in accord with the decisions of the United States Supreme Court.

An examination of the record discloses that certain constitutional rights were claimed by the petitioner as plaintiff in the original action. The pleading of constitutional rights included the following allegations: (1) The Bakery had paid into the State Treasurer erroneously, as sales tax not due from it because it was not a retailer of the goods involved in the sales tax, $27,963.46 [Rec. p. 4], (this is found to be true and is not overthrown by the opinion of the District Court of Appeal); (2) The state claims that the Bakery owes $6,572.28 for the period from October 1st, 1934 to and including June 30th, 1935, when the tax on foodstuff ceased to be in effect because of repeal without a "saving" clause; (3) No part of the $6,572.28 is due to the Board from the Bakery under the findings of fact and conclusions of law of the trial court for a variety of reasons: (a) the repealing statute has no "saving" clause giving the Board the right to collect; (b) there was never due any sum under any cirumstances, as the Bakery was not a retailer but a wholesaler so far as the alleged tax are concerned, and there are offsets greater than the amount claimed; (c) the Statute of Limitations has run on any action by the Board to collect; (d) the Statute of Limi- has run as to any penalty for failure to pay [Rec. p. 6]; (4) The sales tax permit of the Bakery has a value to it and is needed for its business [Rec. p. 7, 8]; (5) The action is not one to restrain the collection of the tax; (6) nor to prevent an action being brought by the Board to try to collect the tax.

The Supreme Court has the power to review the decision of the state court as its decision is based on infringement of a constitutional right and "search the record in the state court in order to see that no constitutional freedom is defeated by insubstantial findings of fact

screening reality." (*Milkwagon Drivers Union v. Meadowmoor Dairies,* 312 U. S. 287, 85 Law. Ed., p. 836.) The issues in an injunction proceeding raising questions of the applicability of a state statute regulating business or affecting the validity of a tax may be reviewed by the United States Supreme Court.

Nashville, etc. v. Wallace, Treasurer, 288 U. S. 249, 261-2, 77 Law. Ed. 731, 735;

Pierce v. Society of Jesus, etc., 268 U. S. 510, 69 Law. Ed. 1070;

Risty v. Great Northern, 270 U. S. 378, 70 Law. Ed. 641;

Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 71 Law. Ed. 303.

2. A corporation has a right to a livlihood and HELMS BAKERIES, a corporation, has such a right, which the evidence shows would be taken away from it by forfeiture of its retail sales tax permit [Rec. pp. 7, 8].

Pierce v. Society of Jesus, supra.

3. The District Court of Appeal in its decision has no right in view of the stipulation of the parties and the findings of fact which were not challenged on appeal, to waive these findings aside and say that it considered the evidence insufficient. The United States Supreme Court has jurisdiction and it is its duty to protect rights to do business.

Terrace v. Thompson, 263 U. S. 197, 68 Law. Ed. 255;

Pierce v. Society of Jesus, supra.

Were the decision in this case to stand, the Board of Equalization and any similar Board without statutory

authority may, without any period of limitation, forfeit any permit to do business for any reason it deems advisable. No injunction would lie. This would be unconstitutional and contrary to decided California law.

Hughson, etc., v. State Board of Equalization, 23 Cal. App. (2d) 281, 3;

Laisne v. California State Board of Optometry, 19 Cal. (2d) 831.

4. The District Court of Appeal was in error when it held that petitioner could pay the money into the State Treasury and recover it back, inasmuch as the statute to which it refers limits this right to sixty days [Rec. p. 31]; and said time expired early in 1935, without any notice whatsoever to petitioner that any money would be claimed. Due process imports a court, notice and an opportunity to be heard.

Hurtado v. Peo. of California, 110 U. S. 51, P. 28 L. ed. 232, 238-9.

5. The State Board of Equalization is not under the statute or the California Constitution, a judicial body. (*Laisne v. Cal. State Board, etc., supra.*) It appears from the record that a court with jurisdiction has determined that there was not any tax liability on the part of the petitioner. The California Retail Sales Tax Act of 1933, as amended, gave no judicial power and could give none to the State Board of Equalization to determine that there had been a violation and therefore to forfeit the sales tax permit for such alleged violation of the statute or rules and regulations. Where no constitutional judicial authority exists to determine facts, and a Board arrogates to itself the authority to determine

such facts (as distinguished from forfeiting a permit after there has been a judicial determination by a court or body with authority to determine the liability), such a Board's decision is arbitrary and a violation of the constitutional rights of the party whose permit is to be forfeited.

Laisne v. California State Board of Optometry, supra.

6. It makes no difference whether the case arises under one form of pleading or another. The form of pleading is immaterial.

Nashville etc. Railway v. Wallens, Comptroller of the State of Tenn., 288 U. S. 249, 77 Law. Ed. 730;

Ex parte Williams as Tax Commissioner, 277 U. S. 267, 272, 72 Law. Ed. 877, 879;

Fidelity & Deposit Co. of Maryland v. Tafoya, Chairman of the State Corporation Commission of New Mexico, et al., 270 U. S. 426, 434-5, 70 Law. Ed. 664, 667;

Home Tel. & Tel. Co. v. City of Los Angeles, 227 U. S. 278, 57 Law. Ed. 510.

Wherefore, your petitioner, HELMS BAKERIES, a corporation, prays that a writ of certiorari issue under the seal of the Supreme Court of the United States of America directed to the Supreme Court of the State of California and the District Court of Appeal of the State of California, in and for the Second Appellate District, Division 2 thereof, commanding said courts to certify and send to this Court a full and complete transcript of the records and of the proceedings of the said California

courts had in the case numbered and entitled upon their dockets as "Supreme Court L. A. No. 17990; District Court of Appeal, First Appellate District, Division 2, Civil No. 11992; Supreme Court of California, 1 Civil, No. 11992, Helms Bakeries, a corporation, plaintiff and respondent, v. State Board of Equalization of the State of California, *et al.*, defendants and appellants," to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment and the decision herein of the said District Court of Appeal, be reversed by the Court and that this Court award such other and further relief as to the Court may seem proper.

Dated this 8th day of December, 1942.

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C. E. McDOWELL and
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Of Counsel.